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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

STATE OF IDAHO,)	
)	No. 41173
Plaintiff-Respondent,)	
)	Ada Co. Case No.
vs.)	CR-2008-19663
)	
ROBERT LOUIS STEVENSON,)	
)	
Defendant-Appellant.)	

BRIEF OF RESPONDENT

**APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF ADA**

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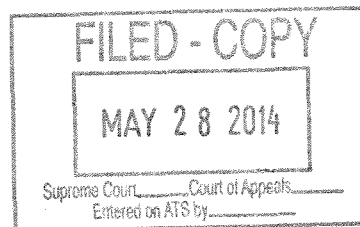


TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	iii
STATEMENT OF THE CASE	1
Nature Of The Case	1
Statement Of The Facts And Course Of The Proceedings	1
ISSUES.....	3
ARGUMENT	4
I. Stevenson Has Failed To Show Error In The District Court's Denial Of His Request For Credit For Time Served To Which He Was Not Entitled.....	4
A. Introduction	4
B. Standard Of Review.....	4
C. Stevenson Is Not Entitled To Credit For Time Spent On Probation	4
II. Stevenson Has Failed To Show Any Constitutional Violation Resulting From The Idaho Supreme Court's Denial Of His Motion To Augment	8
A. Introduction	8
B. Standard Of Review.....	8
C. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision	9
D. Even If The Merits Of Stevenson's Argument Are Reviewed On Appeal, Stevenson Has Failed To Show That The Idaho Supreme Court Violated His Constitutional Rights.....	10
III. Stevenson Has Failed To Establish That The District Court Abused Its Discretion By Denying His Rule 35 Motion For Sentencing Leniency	13

A. Introduction13

B. Standard Of Review.....13

C. The District Court Did Not Abuse Its
Discretion When It Denied Stevenson's
Rule 35 Motion For Sentencing Leniency14

CONCLUSION.....15

CERTIFICATE OF SERVICE.....15

TABLE OF AUTHORITIES

CASES

PAGE

<u>Houghland Farms, Inc. v. Johnson</u> , 119 Idaho 72, 803 P.2d 978 (1990).....	5
<u>Mayer v. City of Chicago</u> , 404 U.S. 189 (1971)	10
<u>McLean v. Maverik Country Stores, Inc.</u> , 142 Idaho 810, 135 P.3d 756 (2006).....	6
<u>Robison v. Bateman-Hall, Inc.</u> , 139 Idaho 207, 76 P.3d 951 (2003).....	5
<u>State v. Banks</u> , 121 Idaho 608, 826 P.2d 1320 (1992)	4
<u>State v. Bradshaw</u> , 155 Idaho 437, 313 P.3d 765 (Ct. App. 2013)	7
<u>State v. Bromgard</u> , 139 Idaho 375, 79 P.3d 734 (Ct. App. 2003)	8
<u>State v. Brunet</u> , 155 Idaho 724, 316 P.3d 640 (2013)	10, 12, 13
<u>State v. Climer</u> , 127 Idaho 20, 896 P.2d 346 (Ct. App. 1995).....	5
<u>State v. Covert</u> , 143 Idaho 169, 139 P.3d 771 (Ct. App. 2006).....	4
<u>State v. Dana</u> , 137 Idaho 6, 43 P.3d 765 (2002)	5
<u>State v. Doe</u> , 147 Idaho 326, 208 P.3d 730 (2009)	6
<u>State v. Huffman</u> , 144 Idaho 201, 159 P.3d 838 (2007)	14
<u>State v. Humphreys</u> , 134 Idaho 657, 8 P.3d 652 (2000).....	5
<u>State v. Moore</u> , 131 Idaho 814, 965 P.2d 174 (1998).....	13
<u>State v. Morgan</u> , 153 Idaho 618, 288 P.3d 835 (Ct. App. 2012)	9
<u>State v. Odiaga</u> , 125 Idaho 384, 871 P.2d 801 (1994)	7
<u>State v. Pierce</u> , 150 Idaho 1, 244 P.3d 145 (2010).....	12
<u>State v. Pina</u> , 149 Idaho 140, 233 P.3d 71 (2010).....	5
<u>State v. Smith</u> , 135 Idaho 712, 23 P.3d 786 (Ct. App. 2001).....	8
<u>State v. Sutton</u> , 113 Idaho 832, 748 P.2d 416 (Ct. App. 1987).....	5

<u>State v. Vasquez</u> , 142 Idaho 67, 122 P.3d 1167 (Ct. App. 2005)	4
<u>State v. Wersland</u> , 125 Idaho 499, 873 P.2d 144 (1994)	13
<u>Taylor v. State</u> , 145 Idaho 866, 187 P.3d 1241 (Ct. App. 2008)	4

STATUTES

I.C. § 18-309	4, 6, 7
I.C. § 19-2603	5

OTHER AUTHORITIES

BLACK'S LAW DICTIONARY 775 (8th ed. 2004)	7
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STATEMENT OF THE CASE

Nature Of The Case

Robert Louis Stevenson appeals from the denials of his Rule 35 motion for leniency and his motion for additional credit for time served. On appeal he argues, contrary to precedent, that he is entitled to credit for the time he spent on probation; that the Idaho Supreme Court violated his constitutional rights by denying his motion to augment the record with irrelevant, as-yet unprepared transcripts; and that the district court abused its discretion by denying his Rule 35 motion for sentencing leniency.

Statement Of The Facts And Course Of The Proceedings

In 2008, the state charged Stevenson with three counts of aggravated assault and one count of using a deadly weapon in the commission of a crime. (R., pp.34-36.) Pursuant to a plea agreement, Stevenson pleaded guilty to one count of aggravated assault and the use of a deadly weapon, and the state dismissed the remaining counts. (R., pp.58-65, 74.) The district court entered judgment against Stevenson, imposed a suspended sentence of eight years with two years fixed, and placed Stevenson on probation for a period of eight years. (R., pp.74-80.)

In 2012, the state alleged that Stevenson violated the terms and conditions of his probation by committing several new crimes, failing to pay his fees, failing to maintain fulltime employment, consuming alcohol, and failing to successfully complete domestic violence treatment. (R., pp.106-09.) Stevenson admitted that he committed new crimes and consumed alcohol (R., p.141) and, following a later hearing, the district court revoked Stevenson's probation and executed his underlying sentence, but retained jurisdiction (R., pp.143-46). Stevenson did not perform well on his period of retained

jurisdiction and the review board recommended that the court relinquish jurisdiction. (PSI, pp. 29-45.) The district court relinquished jurisdiction. (R., pp.150-52.)

Stevenson filed a Rule 35 motion requesting a reduction of his sentence (R., pp.163-66, 181-83), and a motion requesting additional credit for time served (R., pp.175-79). The district court denied both motions. (R., pp.184-91.) Stevenson filed notices of appeal timely from the district court's orders denying his Rule 35 motion and motion for additional credit for time served. (R., pp.192-201.)

On appeal, Stevenson filed a motion to augment the record with the as-yet unprepared transcripts from (1) the March 2, 2009 change of plea hearing, (2) the April 10, 2009 sentencing hearing, (3) the March 30, 2012 probation violation admission hearing, (4) the May 18, 2012 probation violation disposition hearing, and (5) the September 12, 2012 jurisdictional review hearing. (Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof, filed October 2, 2013 (hereinafter "Motion").) The state objected to Stevenson's request for the unprepared transcripts. (Objection to "Motion to Augment and to Suspend the Briefing Schedule and Statement in Support Thereof," filed October 7, 2013.) The Idaho Supreme Court denied the augmentation. (Order Denying Motion to Augment and to Suspend the Briefing Schedule, dated October 16, 2013.)

ISSUES

Stevenson states the issues on appeal as:

1. Whether the district court erred in denying Mr. Stevenson's motion for credit for time served while on probation.
2. Whether the Idaho Supreme Court deprived Mr. Stevenson of His [sic] constitutional rights to due process and equal protection by denying his request to augment the record with transcripts of hearings relevant to the issue of whether the district court should have reduced his sentence pursuant to I.C.R. 35(b).
3. Whether the district court abused its discretion when it denied Mr. Stevenson's motion for reduction in sentence.

(Appellant's brief, p.6.)

The state rephrases the issues as:

1. A defendant is not entitled to credit for time spent on probation. Has Stevenson failed to show error in the district court's denial of his motion for additional credit for time to which he was not entitled?
2. If this case is assigned to the Idaho Court of Appeals, should that Court decline to review the order of the Idaho Supreme Court? Alternatively, has Stevenson failed to show any constitutional violation resulting from the Idaho Supreme Court's denial of his motion to augment the record with transcripts that have not been prepared?
3. Has Stevenson failed to establish that the district court abused its discretion by denying his Rule 35 motion for sentencing leniency?

ARGUMENT

I.

Stevenson Has Failed To Show Error In The District Court's Denial Of His Request For Credit For Time Served To Which He Was Not Entitled

A. Introduction

Below, Stevenson filed a motion requesting credit for the time he spent on probation. (R., pp.175-79.) The district court denied the motion, explaining that Idaho Code § 18-309 does not entitle a defendant to credit for time spent on probation. (R., pp.189-90.) On appeal, Stevenson argues that the district court erred in its interpretation of the statute. Application of the correct legal standards, and the several controlling legal precedents on this issue, shows no error by the district court.

B. Standard Of Review

"The question of whether a sentencing court has properly awarded credit for time served to the facts of a particular case is a question of law, which is subject to free review by the appellate courts." State v. Vasquez, 142 Idaho 67, 68, 122 P.3d 1167, 1168 (Ct. App. 2005) (citation omitted)). "We defer to the trial court's findings of fact, however, unless those findings are unsupported by substantial and competent evidence in the record and are therefore clearly erroneous." State v. Covert, 143 Idaho 169, 170, 139 P.3d 771, 772 (Ct. App. 2006).

C. Stevenson Is Not Entitled To Credit For Time Spent On Probation

It is well-settled that a defendant is not entitled to credit against his sentence for time spent on probation under a suspended sentence. Taylor v. State, 145 Idaho 866, 869-70, 187 P.3d 1241, 1244-45 (Ct. App. 2008). See also State v. Banks, 121 Idaho

608, 609, 826 P.2d 1320, 1321 (1992) (“a defendant is not entitled to credit for time served while on probation if s/he is not incarcerated, but at liberty”); State v. Climer, 127 Idaho 20, 23, 896 P.2d 346, 349 (Ct. App. 1995) (“it is well settled that a defendant is not entitled to credit against his or her sentence for time spent on probation, when sentence is pronounced or ordered into execution upon termination of probation”); State v. Sutton, 113 Idaho 832, 834, 748 P.2d 416, 418 (Ct. App. 1987) (defendant not entitled to credit for time spent on probation before probation was finally terminated); I.C. § 19-2603 (“the time such person shall have been at large under such suspended sentence shall not be counted as a part of the term of his sentence”).

Ignoring these controlling precedents, Stevenson argues that he should be given credit for the time he spent on probation. (Appellant’s brief, pp.7-18.) But Idaho jurisprudence requires respect for its own precedents. The rule of *stare decisis* dictates that controlling precedent be followed “unless it is manifestly wrong, unless it has proven over time to be unjust or unwise, or unless overruling it is necessary to vindicate plain, obvious principles of law and remedy continued injustice.” State v. Dana, 137 Idaho 6, 9, 43 P.3d 765, 768 (2002); State v. Humphreys, 134 Idaho 657, 660, 8 P.3d 652, 655 (2000) (quoting Houghland Farms, Inc. v. Johnson, 119 Idaho 72, 77, 803 P.2d 978, 983 (1990)). Stevenson has failed to acknowledge the foregoing precedents, much less show that they should be overturned.

Instead Stevenson contends that the statutes governing credit for time served have been misinterpreted. (Appellant’s brief, pp.7-8.) The objective of statutory interpretation is to give effect to legislative intent. State v. Pina, 149 Idaho 140, 144, 233 P.3d 71, 75 (2010); Robison v. Bateman-Hall, Inc., 139 Idaho 207, 210, 76 P.3d

951, 954 (2003). Because “the best guide to legislative intent” is the words of the statute, the interpretation of a statute must begin with the literal words of the statute. State v. Doe, 147 Idaho 326, 328, 208 P.3d 730, 732 (2009). Where the statutory language is unambiguous, a court does not construe it but simply follows the law as written. McLean v. Maverik Country Stores, Inc., 142 Idaho 810, 813, 135 P.3d 756, 759 (2006).

Idaho Code § 18-309, which governs credit for time served, is unambiguous and provides:

In computing the term of imprisonment, the person against whom the judgment was entered, shall receive credit in the judgment for any period of incarceration prior to entry of judgment, if such incarceration was for the offense or an included offense for which the judgment was entered. The remainder of the term commences upon the pronouncement of sentence and if thereafter, during such term, the defendant by any legal means is temporarily released from such imprisonment and subsequently returned thereto, the time during which he was at large must not be computed as part of such term.

I.C. § 18-309. Stevenson focuses his argument on the terms “temporarily released” and “at large,” arguing that probation is not temporary (Appellant’s brief, pp.8-10) and that a defendant is only at large when he has escaped or absconded (id., pp.10-17). Applying the correct standards of statutory interpretation, both arguments fail. First, whether probation, generally, is intended to be a permanent release or a temporary release is irrelevant to this case. As a matter of fact, Stevenson’s probation was a temporary release; his probation has been revoked, and he is again incarcerated. (R., pp.143-46, 150-52.) Second, “at large” means “not imprisoned.” The voluntary restrictions entered into as conditions of probation do not imprison the probationer. A probationer, therefore, is at large.

Ignored by Stevenson, the essential term in the statute is “incarceration.” Credit is only granted under Idaho Code § 18-309 for periods of incarceration. Incarceration is “[t]he act or process of confining someone; imprisonment.” BLACK’S LAW DICTIONARY 775 (8th ed. 2004). Probation, on the other hand, is “a court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison.” *Id.* at 1240. Clearly, probation and incarceration are not synonyms. Because a probationer is necessarily not incarcerated, a defendant is not entitled to credit for time spent on probation.

Finally, Stevenson argues that his personal interpretation of Idaho Code § 18-309, which is contrary to the plain language of the statute and all the legal precedents, creates an ambiguity in the statute which, under the rule of lenity, must be resolved in his favor. (Appellant’s brief, p.18.) Stevenson’s argument fails. The rule of lenity only applies when there are two equally reasonable interpretations of an ambiguous statute. State v. Bradshaw, 155 Idaho 437, ___, 313 P.3d 765, 768-69 (Ct. App. 2013). Idaho Code § 18-309 is unambiguous and, considering the plain language of the statute, Stevenson’s interpretation is anything but reasonable. The rule of lenity, therefore, does not apply.

Stevenson has failed to demonstrate any basis for overturning the long line of controlling precedents which have determined that defendants are not entitled to credit for the time they spend on probation. “Having previously decided this question, and being presented with no new basis upon which to consider the issue, [this Court must be] guided by the principle of *stare decisis* to adhere to the law as expressed in [its] earlier opinions.” State v. Odiaga, 125 Idaho 384, 388, 871 P.2d 801, 805 (1994). The

district court's denial of Stevenson's motion for additional credit for time served, to which he is not entitled, should be affirmed.

II.

Stevenson Has Failed To Show Any Constitutional Violation Resulting From The Idaho Supreme Court's Denial Of His Motion To Augment

A. Introduction

Stevenson contends that by denying his motion to augment the appellate record with the as-yet unprepared transcripts of various hearings, the Idaho Supreme Court violated his constitutional rights to due process and equal protection, and has denied him effective assistance of counsel on appeal. (Appellant's brief, pp.18-24.) Stevenson's argument fails. Should this case be assigned to the Idaho Court of Appeals, that Court lacks the authority to review the Idaho Supreme Court's decision to deny Stevenson's motion. Even if the Idaho Supreme Court's denial of Stevenson's motion is reviewed on appeal, Stevenson has failed to establish a violation of his constitutional rights.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. The Idaho Court Of Appeals, Should It Be Assigned This Case, Lacks The Authority To Review The Idaho Supreme Court's Decision

The Idaho Court of Appeals has “disclaim[ed] any authority to review, and, in effect, reverse an Idaho Supreme Court decision made on a motion made prior to assignment of the case to [the Idaho Court of Appeals] on the ground that the Supreme Court decision was contrary to the state or federal constitutions or other law.” State v. Morgan, 153 Idaho 618, 620, 288 P.3d 835 (Ct. App. 2012). “Such an undertaking,” the Court explained, “would be tantamount to the Court of Appeals entertaining an ‘appeal’ from an Idaho Supreme Court decision and is plainly beyond the purview of this Court.” Id. However, the Idaho Court of Appeals did leave open the possibility of review of such motions in some circumstances. Id. Such circumstances may occur, the Court indicated, where “the completed appellant’s and/or respondent’s briefs have refined, clarified, or expanded issues on appeal in such a way as to demonstrate the need for additional records or transcripts, or where new evidence is presented to support a renewed motion.” Id.

Should the Idaho Court of Appeals be assigned this case, it lacks the authority to review the Idaho Supreme Court’s order. Stevenson has failed to demonstrate the need for additional transcripts, and he has not presented any evidence to support a renewed motion to augment the record. The arguments Stevenson advances on appeal as to why the record should be augmented with the transcripts at issue constitute essentially the same arguments he presented to the Idaho Supreme Court in his motion—*i.e.*, that the scope of appellate review of a sentence requires consideration of the transcripts and that his constitutional rights will be violated without the transcripts. (Compare Motion with Appellant’s brief, pp.18-24.)

Because the Idaho Court of Appeals lacks the authority to review and, in effect, reverse a decision of the Idaho Supreme Court, and because Stevenson has failed to provide any new evidence or clarification in his Appellant's brief that would permit the Idaho Court of Appeals to do so, the Idaho Court of Appeals must decline, if it is assigned this case, to review the Idaho Supreme Court's denial of Stevenson's motion to augment the record.

D. Even If The Merits Of Stevenson's Argument Are Reviewed On Appeal, Stevenson Has Failed To Show That The Idaho Supreme Court Violated His Constitutional Rights

To the extent this Court considers the merits of Stevenson's constitutional claims, all of his arguments fail. Stevenson argues that he is entitled to the additional transcripts because, he claims, the failure to provide them is a violation of his constitutional rights to due process, equal protection, and the effective assistance of appellate counsel. (Appellant's brief, pp.18-24.) The Idaho Supreme Court recently rejected the same arguments in State v. Brunet, 155 Idaho 724, 316 P.3d 640 (2013).

In Brunet, the Court stated: "When an indigent defendant requests that transcripts be created and incorporated into a record on appeal, the grounds of the appeal must make out a colorable need for the additional transcripts." Brunet, 155 Idaho at ___, 316 P.3d at 643 (citing Mayer v. City of Chicago, 404 U.S. 189, 195 (1971)). "[C]olorable need is a matter of law determined by the court based upon the facts exhibited." Id. In order to show a colorable need, an appellant must show "the requested transcripts contained specific information relevant to [the] appeal." Id. "[H]ypothesiz[ing] that the lack of ... transcripts could prevent [Stevenson] from determining whether there were additional issues to raise, or whether there was factual

information contained in the transcripts that might relate to his arguments” does not demonstrate a “colorable need.” See Id. In other words, an appellant is not entitled to transcripts in order to “search the transcripts for a reason to request and incorporate the transcripts in the first place.” Id. Such an endeavor is a “‘fishing expedition’ at taxpayer expense”—an exercise the constitution does not endorse. See Id. In short, “[m]ere speculation or hope that something exists does not amount to the appearance or semblance of specific information necessary to establish a colorable need.” Id.

Stevenson argues the transcripts from the April 10, 2009 sentencing hearing, May 18, 2012 probation violation disposition hearing, and September 12, 2012 retained jurisdiction review hearing are relevant, regardless of whether they have been prepared or not, because the same judge who denied Stevenson’s Rule 35 motion also presided over those prior hearings.¹ (Appellant’s brief, pp.20-23.) That does not show a colorable need for the requested transcripts. Stevenson has cited no basis for concluding that comments he made at prior hearings had any bearing on or relevance to the district court’s denial of Rule 35 relief. Presumably if Stevenson had something compelling to say that could impact the court’s decision whether to reduce his sentence, he could and should have included it in his motion rather than assuming (at least on appeal) that the court might remember it. Even if Stevenson believes the district court remembered and relied on some specific prior statements from past hearings that would be pertinent to this Court’s review of the district court’s denial of Rule 35 relief, Stevenson could have obtained that information by means other than having a transcript

¹ Stevenson does not challenge on appeal the Idaho Supreme Court’s denial of his motion to augment the record in relation to the transcripts for the March 2, 2009 change of plea hearing and the March 30, 2012 probation violation admission hearing. (Appellant’s brief, p.4 n.3.)

prepared, such as by requesting and listening to the recordings of those hearings and, if he discovered something relevant, moving to augment the record after making the appropriate showing of relevance. He did not.

Although the appellate court's review of a sentence is independent, it is also limited to the "entire record available to the trial court at sentencing." Brunet, 155 Idaho at ___, 316 P.3d at 644 (citing State v. Pierce, 150 Idaho 1, 5, 244 P.3d 145, 149 (2010)). As in Brunet, the record in this case contains all relevant materials. It includes Stevenson's original presentence report prepared April 2, 2009 (PSI, pp.67-74) and his subsequent presentence report prepared April 19, 2012 (PSI, pp.1-7); the reports from his period of retained jurisdiction (PSI, pp.29-45); the minutes from the hearings for which Stevenson desires a transcript (R., pp.68-69, 142, 149); and the court orders that issued as a result of those hearings (R., pp.74-80, 143-46, 150-52). "Therefore, the entire record available to the trial court at sentencing is contained within the record on appeal." Brunet, 155 Idaho at ___, 316 P.3d at 644. As such, Stevenson "has failed to demonstrate that he was denied due process or equal protection by this Court's refusal to order the creation of transcripts at taxpayer expense in order to augment the record on appeal." Id.

Stevenson also argues that effective assistance of appellate counsel cannot be given in the absence of access to the transcripts. (Appellant's brief, pp.23-24, n.10.) This argument also fails. Addressing the claim that "refusal to order the creation of the requested transcripts for incorporation into the record" results in the "prospective[]" denial of the effective assistance of counsel, the Court in Brunet concluded that Brunet "failed to demonstrate how his counsel's performance fell below an objective standard

of reasonableness without the requested transcripts,” noting “the entire record available to the trial court at sentencing is contained within the record on appeal.” Brunet 155 Idaho at ___, 316 P.3d at 644. The same is true in this case. “This record meets [Stevenson’s] right to a record sufficient to afford adequate and effective appellate review.” Id. As such, Stevenson has failed to show a Sixth Amendment violation based on the denial of his motion to augment.

Because Stevenson failed to show a “colorable need” for any of the transcripts he was denied, assuming this Court addresses his claim that the denial of his motion to augment with those transcripts violated his constitutional rights, his claims fail.

III.

Stevenson Has Failed To Establish That The District Court Abused Its Discretion By Denying His Rule 35 Motion For Sentencing Leniency

A. Introduction

Stevenson argues that the district court abused its discretion by denying his Rule 35 motion for leniency. (Appellant’s brief, pp.24-28.) Stevenson has failed to establish an abuse of the district court’s sentencing discretion.

B. Standard Of Review

“Sentencing decisions are reviewed for an abuse of discretion.” State v. Moore, 131 Idaho 814, 823, 965 P.2d 174, 183 (1998) (citing State v. Wersland, 125 Idaho 499, 873 P.2d 144 (1994)).

C. The District Court Did Not Abuse Its Discretion When It Denied Stevenson's Rule 35 Motion For Sentencing Leniency

If a sentence is within applicable statutory limits, a motion for reduction of sentence under Rule 35 is a plea for leniency, and the Court reviews the denial of the motion for an abuse of discretion. State v. Huffman, 144 Idaho 201, 203, 159 P.3d 838, 840 (2007). To prevail on appeal, Stevenson must “show that the sentence is excessive in light of new or additional information subsequently provided to the district court in support of the Rule 35 motion.” Id. Stevenson failed to carry this burden.

The additional information provided by Stevenson in support of his Rule 35 motion for leniency was an attendance log for various programs he had participated in during his most recent period of incarceration. (R., p.183.) Stevenson argues that this programming demonstrates that he “has taken steps toward rehabilitation.” (Appellant’s brief, p.25.) The district court also expressed approval that Stevenson was finally participating in the programming and resources available to him prison. (R., p.187.) This participation, however, was belated. As noted by the district court, Stevenson was originally convicted and sentenced for a crime of violence in which he used a weapon. (R., p.187.) Stevenson was twice given opportunities to take advantage of lenient sentencing options: first through probation which he failed by violating his terms and conditions; second through a retained jurisdiction which he failed by not engaging in the programming. (Id.) In light of Stevenson’s failures both outside of confinement and in lenient sentencing structures, he has failed to show an abuse of the district court’s sentencing discretion.

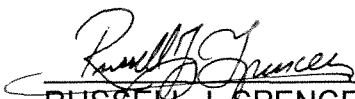
Stevenson’s sentences were reasonable when imposed, were reasonable when he filed his Rule 35 motion, and remain reasonable now. Having failed to show an

abuse of the district court's sentencing discretion, the order of the district court should be affirmed.

CONCLUSION

The state respectfully requests that this Court affirm the district court's orders denying Stevenson's Rule 35 motions.

DATED this 28th day of May, 2014.




RUSSELL J. SPENCER
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 28th day of May, 2014, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.



RUSSELL J. SPENCER
Deputy Attorney General

RJS/pm